

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

FILED BY CLERK

APR -5 2007

COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,

Appellee,

v.

MICHAEL ANTHONY COLMENERO,

Appellant.

2 CA-CR 2006-0189

DEPARTMENT B

MEMORANDUM DECISION

Not for Publication

Rule 111, Rules of
the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20050544

Honorable Ted B. Borek, Judge

AFFIRMED

Isabel G. Garcia, Pima County Legal Defender
By Stephan J. McCaffery

Tucson
Attorneys for Appellant

B R A M M E R, Judge.

¶1 After a jury trial, appellant Michael Colmenero was convicted of two counts of aggravated assault and one count of possession of a deadly weapon by a prohibited possessor. Both assaults were found to be dangerous nature offenses involving the use, discharge, or threatening exhibition of a handgun, and both were class three felonies.

Prohibited possession is a class four felony. The trial court imposed concurrent, presumptive terms of imprisonment on all three counts, the longest of which was 7.5 years.

¶2 Counsel has filed a brief in compliance with *Anders v. California*, 386 U.S. 738, 87 S. Ct. 1396 (1967), and *State v. Clark*, 196 Ariz. 530, 2 P.3d 89 (App. 1999), stating he has thoroughly reviewed the record on appeal and has found no meritorious issues to raise. He asks this court to search the entire record for error. Colmenero has filed a supplemental brief, claiming the evidence is insufficient to support one of the aggravated assault convictions and all three of his convictions must be reversed because the jury was instructed on reasonable doubt in accordance with *State v. Portillo*, 182 Ariz. 592, 898 P.2d 970 (1995), an instruction he contends improperly lowers the state's burden of proof. Finding no error, we affirm.

¶3 The charges against Colmenero arose from a dispute in which he allegedly fired shots at a car in which Fabian Moreno was a passenger. Colmenero contends the evidence was insufficient to support the jury's finding that Moreno had been placed in reasonable apprehension of imminent physical injury. *See* A.R.S. §§ 13-1204(A)(2) and 13-1203(A)(2). Colmenero first notes the jury found him not guilty of aggravated assault charges pertaining to two of Moreno's fellow passengers, Mario and Elizabeth Sanchez, and not guilty of an additional charge of discharging a firearm at a nonresidential structure. To the extent Colmenero suggests the jury's verdicts were thus inconsistent, he fails to state a

basis for reversal. *See State v. Garza*, 196 Ariz. 210, ¶ 7, 994 P.2d 1025, 1027 (App. 1999) (mere inconsistency of verdicts not grounds for reversal).

¶4 Colmenero next notes Moreno testified he remained in the vehicle during the shooting, did not see Colmenero, and had been uncertain what was “going on” at the time of the shooting. Although not necessarily inaccurate, Colmenero’s depictions of Moreno’s testimony ignore Moreno’s further account that, as the driver argued outside the car with a man she identified as Colmenero, Moreno saw the man reaching into his waistband and heard the driver say, “He has got a gun.” Moreno also testified that, while he remained in the vehicle, “[o]ne shot hit[] the window” of the car, breaking glass; “[t]he second shot . . . hit the side of the panel”; and a third shot created “a spark on the ground, as the asphalt got hit by another bullet.” Moreno described “looking forwards” during the incident, hoping he would not “have any holes in [his] head,” and feeling “overwhelmed” and “freaked . . . out.” Viewing this testimony in the light most favorable to upholding the jury’s verdict and resolving all reasonable inferences against Colmenero, *see State v. George*, 206 Ariz. 436, ¶ 3, 79 P.3d 1050, 1054 (App. 2003), we find no merit to Colmenero’s claim that the jury lacked adequate evidence to find he had used a deadly weapon and had intentionally placed Moreno in reasonable apprehension of imminent physical injury. *See* §§ 13-1204(A)(2); 13-1203(A)(2).

¶5 We summarily dispose of Colmenero’s argument concerning the *Portillo* instruction. Our supreme court has already rejected this argument, *see State v. Dann*, 205

Ariz. 557, ¶ 74, 74 P.3d 231, 249-50 (2003), and we are bound to follow our supreme court's decisions, *see State v. Sullivan*, 205 Ariz. 285, ¶ 15, 69 P.3d 1006, 1009 (App. 2003).

¶6 Pursuant to our obligation under *Anders*, we have reviewed the entire record. We have found no error that can be characterized as fundamental and prejudicial. Accordingly, we affirm Colmenero's convictions and sentences.

J. WILLIAM BRAMMER, JR., Judge

CONCURRING:

PETER J. ECKERSTROM, Presiding Judge

PHILIP G. ESPINOSA, Judge